

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6684

DATE COMPLAINT FILED: November 1, 2012

DATE OF NOTIFICATION: November 8, 2012

LAST RESPONSE RECEIVED: December 21, 2012

DATE ACTIVATED: March 5, 2013

ELECTION CYCLE: 2012

EXPIRATION OF SOL: October 30, 2017 (earliest)
November 6, 2017 (latest)

COMPLAINANT:

James R. Holden, Campaign Manager and Counsel
for Hoosiers for Richard Mourdock, Inc.

RESPONDENTS:

Gregg for Indiana
John Gregg

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(20)(1)(iii)
2 U.S.C. § 431(22)
2 U.S.C. § 441i(f)
11 C.F.R. § 300.71
11 C.F.R. § 330.72

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves allegations that John Gregg, the 2012 Democratic candidate for governor of Indiana, and Gregg for Indiana, his state campaign committee, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), when they paid for an advertisement that allegedly attacked Mike Pence, Gregg's Republican opponent, and Richard Mourdock, the Republican candidate for U.S. Senate from Indiana. Public communications that "refer to a candidate for federal office and that promote, attack, support, or oppose ('PASO') a candidate

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1 for that office," are considered "federal election activity" — a category of activities required to
2 be paid for with funds subject to the limitations and prohibitions of the Act. *See* 2 U.S.C.
3 §§ 431(20)(1)(iii), 441i(f)(1). Gregg and Gregg for Indiana maintain that they did not violate
4 the Act or Commission regulations because the advertisement does not "attack" or "oppose"
5 Mourdock. We conclude that the advertisement here does not attack or oppose Mourdock and
6 therefore that the Respondents were not required to pay for the advertisement with federal
7 funds. Accordingly, we recommend that the Commission find no reason to believe that Gregg
8 for Indiana and John Gregg violated 2 U.S.C. § 441i(f)(1).

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Factual Background**

11 The Complaint asserts that the Respondents violated 2 U.S.C. § 441i(f) and 11 C.F.R.
12 § 300.71 by using non-federal funds to pay for a public communication that "attacked" a federal
13 candidate. Compl. at 1. Unlike the Act, Indiana campaign finance law permits state candidates
14 to accept unlimited individual contributions and contributions of up to \$5,000 from corporate and
15 labor organizations, and therefore funds raised by a state candidate may not be federally
16 permissible. *See* IND. CODE § 3-9-2-4; *see also* [http://campaignfinance.in.gov/PublicSite/](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx)
17 [AboutReporting.aspx](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx). A review of Gregg for Indiana's disclosure reports filed with the Indiana
18 Secretary of State confirmed that the Committee accepted corporate contributions, labor
19 organization contributions, and individual contributions in excess of the federal limits. *See*
20 <http://campaignfinance.in.gov/PublicSite/SearchPages/CommitteeDetail.aspx?OrgId=6174>.

21 The advertisement, entitled "Back and Forth," began airing on October 30, 2012. Compl.
22 at 2. Public records attached to the Complaint show that Gregg for Indiana paid approximately
23 \$260,000 to air the advertisement through November 6, 2012. Compl., Attach. 2. The

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- 1 advertisement generally provides a series of comparative statements and positions associated
- 2 with Mourdock, a candidate for federal office, and Pence, Gregg's gubernatorial opponent:

Male voiceover:	Richard Mourdock
Video clip of Mourdock:	"I think the Tea Party movement is one of the most exciting political activities in my lifetime."
Male voiceover:	Mike Pence
Video clip of Pence: On-screen news banner: CONGRESSIONAL TEA PARTY CANDIDATES RALLYING IN WASHINGTON TODAY	"Uhh, we'll welcome the Tea Party with open arms."
Male voiceover:	How they'd govern...
Video clip of Mourdock: On-screen news banner: REPUBLICAN REBELLION MOURDOCK: MUST CHANGE THE WAY SENATE LEADERSHIP THINKS	"To me, the highlight of politics, frankly, is to inflict my opinion on someone else."
Video clip of Pence:	"Let's go pick a fight."
Male voiceover:	And even after Mourdock said pregnancy from rape was something...
Video clip of Mourdock: On-screen news banner: INDIANA SENATE DEBATE RICHARD MOURDOCK Indiana, Candidate for U.S. Senate	"... God intended to happen."
Video clip of Pence:	"I support his candidacy for the Senate."
Male voiceover: On-screen photo of John Gregg Caption: JOHN GREGG FOR GOVERNOR PAID FOR BY GREGG FOR INDIANA	You can stop the Tea Party with Governor John Gregg.

- 3
- 4 Gregg and Gregg for Indiana assert that "Back and Forth" does not "attack" or "oppose"
- 5 Mourdock and therefore could be paid for with non-federal funds without violating the Act.
- 6 Resp. at 2. The Response contends that by including Mourdock in the advertisement, the Gregg
- 7 campaign's goal was to link Pence with Mourdock's views regarding the Tea Party and abortion,
- 8 which had received significant national media attention in the week before the advertisement
- 9 began airing. *Id.* The Response asserts that at the time of the advertisement's airing,

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1 Mourdock's campaign had fallen significantly behind his opponent, while Pence's response to
2 Mourdock's views had become an issue in the Indiana gubernatorial election. *Id.* at 1-2. The
3 Response also claims that the content of the advertisement demonstrates it did not "attack" or
4 "oppose" Mourdock. *Id.* at 3. Not only did the advertisement avoid a reference to Mourdock's
5 candidacy, but, as the Response points out, the final tagline of the advertisement — "You can
6 stop the Tea Party with Governor John Gregg" — only mentions Gregg. *Id.* The Response
7 further asserts that, even if the advertisement presents a close call as to whether it attacks or
8 opposes Mourdock, the Commission should not use the enforcement process to define PASO, a
9 standard for which the Commission has purportedly failed to provide any meaningful guidance.
10 *Id.* at 3-4.

11 **B. Legal Analysis**

12 The sole issue in this matter is whether the "Back and Forth" advertisement attacks or
13 opposes federal candidate Richard Mourdock, such that Gregg for Indiana was required to pay
14 for the advertisement with federal funds.

15 The Act prohibits a candidate for state or local office or an agent of such candidate from
16 spending any funds for public communications that qualify as "federal election activity"
17 ("FEA"), unless the funds are subject to the limitations, prohibitions, and reporting requirements
18 of the Act. 2 U.S.C. § 441i(f)(1); 11 C.F.R. § 300.71. Public communications are considered
19 FEA, and thus regulable under the Act, if they refer to a candidate for federal office and they
20 promote, attack, support, or oppose a candidate for that office, regardless of whether the
21 communication expressly advocates a vote for or against a candidate.¹ 2 U.S.C.

¹ The term "public communication" is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22).

1 § 431(20)(1)(iii). Public communications are not FEA, however, and thus not federally
2 regulated, if they are in connection with an election for a state or local office and refer only to the
3 candidates for the state or local office, but do not promote, attack, support, or oppose any
4 candidate for federal office. 2 U.S.C. § 441i(f)(2); 11 C.F.R. § 300.72.

5 Congress included the PASO standard in the Bipartisan Campaign Reform Act of 2002
6 ("BCRA"), but neither Congress nor the Commission has defined the concept. BCRA lacked a
7 definition of the PASO terms and the Commission has twice proposed but not adopted
8 definitions for PASO. *See Prohibited and Excessive Contributions*, 67 Fed. Reg. 35,654, 35,681
9 (May 20, 2002) (Notice of Proposed Rulemaking); *Coordination*, 74 Fed. Reg. 53,893, 53,898-
10 900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).² Despite the lack of a statutory or
11 regulatory definition, the PASO terms themselves "clearly set forth the confines within which
12 potential party speakers must act in order to avoid triggering the provision," and they "provide
13 explicit standards for those who apply them and give the person of ordinary intelligence a
14 reasonable opportunity to know what is prohibited." *McConnell v. FEC*, 540 U.S. 93, 170 n.64
15 (2003).

16 In a series of advisory opinions that applied the PASO standard, the Commission has
17 determined that the mere identification of an individual as a federal candidate in a public
18 communication — such as when a federal candidate endorses a state candidate — does not, by
19 itself, promote, attack, support, or oppose the federal candidate. *See Advisory Op. 2007-34*
20 *(Jackson)*; *Advisory Op. 2007-21 (Holt)*; *Advisory Op. 2003-25 (Weinzapfel)*. In *Advisory*

² Despite the lack of a definition, Congress clearly did not intend the FEA provisions to prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose a Federal candidate." Statement of Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

1 Opinion 2009-26 (Coulson), the Commission provided guidance on when a federal candidate's
2 state committee or state office account could pay for a communication. The Commission
3 concluded that non-federal funds could be used to pay for a "health care legislative update" letter
4 because the communication was solely related to state officeholder duties, did not solicit any
5 donations, and did not expressly advocate the candidate's election or the defeat of her opponents.
6 Advisory Op. 2009-26 (Coulson) at 8. The Commission did state, however, that the following
7 phrases could be construed to promote or support Representative Coulson: (1) "I have refrained
8 committed to making progress for the residents of this State," and (2) "I will continue to look for
9 innovative ideas to help improve the healthcare system in Illinois, as well as help improve the
10 lives of those who need our care." But the Commission determined that non-federal funds could
11 be used to pay for the letter because the adjectives were used to "address Coulson's past and
12 ongoing legislative actions as a state officeholder" rather than her qualities as a candidate. *Id.* at
13 9.

14 In several recent enforcement matters, the Office of the General Counsel ("OGC") has
15 recommended that the Commission find that certain communications promoted, supported,
16 attacked, or opposed a federal candidate. We believe, however, that the communications in those
17 matters are distinguishable from the content of advertisement at issue here. In MUR 6207
18 (DeSaulnier), OGC recommended that the Commission find that a "Health Services Guide"
19 promoted and supported incumbent California State Senate and U.S. Congressional candidate
20 DeSaulnier because the language generally promoted the candidate's personal characteristics and
21 qualities as a candidate. First Gen. Counsel's Rpt. at 11-12, MUR 6207 (DeSaulnier). The
22 included endorsement of another state senator stated, "Mark DeSaulnier is a natural leader, an
23 independent thinker and a coalition builder who brings things together to get things done. He

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1 has invaluable real world experience as a small businessman that consistently and positively
2 informs his work for the people of this district." *Id.* at 11. The guide also referred to other state
3 and federal candidates. *Id.* at 10. Despite OGC's recommendation, the Commission voted to
4 exercise its prosecutorial discretion to dismiss the allegations. Certification, MUR 6207
5 (DeSaulnier) (July 16, 2010). A Statement of Reasons issued by five Commissioners reasoned
6 that the disbursements for the guide may have been in connection with a non-federal election
7 because it contained a discussion of healthcare issues and DeSaulnier's involvement with those
8 issues as a state senator, as well as the included statement from DeSaulnier's fellow state senator
9 praising him. Statement of Reasons, Comm'rs. Bauerly, Hunter, McGahn, Petersen, and
10 Weintraub at 4, MUR 6207 (DeSaulnier). The Commissioners also found that a small picture of
11 President Obama delivering the State of the Union address was insufficient to require that the
12 guide be paid with federal funds. *Id.*

13 Similarly, the content of the communications in MUR 6113 (Hollingsworth) supported
14 federal candidates John McCain and Sarah Palin and opposed Barack Obama. Accordingly,
15 OGC recommended that the Commission find that a mailer and radio advertisements run by a
16 state candidate — which attempted to link the state candidate with John McCain and Sarah Palin
17 and to link his opponent with Barack Obama — promoted, attacked, supported, or opposed the
18 federal candidates. First Gen. Counsel's Rept. at 5-7, MUR 6113 (Hollingsworth). The mailer
19 stated, in part, "Kirby Hollingsworth and John McCain: Real experience. Real solutions. Both
20 are ready to lead . . . 'Northwest Texas is firmly behind John McCain and Sarah Palin — and so
21 am I.' —Kirby Hollingsworth . . . Mark Homer urges voters to blindly follow Barack Obama's
22 liberal policies." The radio advertisement emphasized similar themes. *Id.* at 3. The

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1 Commission split 3-3 on OGC's recommendation. Certification, MUR 6113 (Sept. 1, 2009)
2 (Hollingsworth).³

3 Here, we conclude that, on balance, the advertisement at issue does not attack or oppose
4 Richard Mourdock. The advertisement's focus is the Indiana gubernatorial election, specifically
5 in opposition to Pence and in support of Gregg. Mourdock's statements are included in a manner
6 that links Pence to Mourdock's views and party affiliations, and the statements are offered
7 without commentary. Although Gregg attacks Pence by linking his policy positions with
8 Mourdock, the advertisement's tagline — "You can stop the Tea Party with Governor John
9 Gregg" — is focused on the Indiana gubernatorial election and does not exhort viewers to vote
10 against Mourdock.

11 Moreover, while the language in the Gregg advertisement does comment on Mourdock's
12 character or qualities as a candidate, this commentary is neither as strong nor as direct as the
13 commentary about the federal candidates in the DeSaulnier and Hollingsworth matters. Merely
14 portraying a candidate in a negative light, as here, does not alone attack or oppose a federal
15 candidate under the PASO standard. Something more is required. The ordinary understanding

³ See also Statement of Reasons, Comm'rs. Bauerly, Walther, and Weintraub, MUR 6113 (Hollingsworth) (explaining their votes to approve OGC's recommendation, but noting that Hollingsworth's argument that the communications were intended principally to advance his own candidacy had some merit); Statement of Reasons, Comm'rs. Hunter, McGahn, and Petersen, MUR 6113 (Hollingsworth) (explaining their votes against the recommendations and arguing that the PASO provision was not intended to restrict state candidates from advertising endorsements or comparing their views with those of federal candidates, the question of what constitutes PASO is unsettled as a matter of law, and proceeding in the matter would raise constitutional issues that could be avoided).

Although less instructive because it involved little commentary about the federal candidate, OGC recommended in MUR 6431 (Republican Senate Majority Committee) that the Commission find that newspaper advertisements featuring U.S. Senate candidate Kelly Ayotte endorsing candidates for state office and urging readers to "Please Vote This Thursday" did not promote, attack, support, or oppose Ayotte. First Gen. Counsel's Rept. at 17-18, MUR 6431 (Republican Senate Majority Committee). The Commission split 3-3 on the recommendations. Certification, MUR 6431 (Republican Senate Majority Committee) (Nov. 3, 2011); see also Statement of Reasons, Comm'rs. Bauerly, Walther, and Weintraub, MUR 6431 (Republican Senate Majority Committee) (assessing that the advertisements "promoted" or "supported" Ayotte and were not *bona fide* endorsements because Ayotte's name appeared first, her picture was the most prominent, and a reasonable observer would understand the exhortation to vote to apply to Ayotte as well as the state candidates).

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of the term "attack" suggests more than mere aversion, but "to blame; to direct unfavorable criticism against; criticize severely; argue with strongly." WEBSTER'S UNABRIDGED DICTIONARY at 133 (Random House 2nd ed. 2005); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE at 88 (4th ed. 2006) (defining "attack" as "to criticize strongly or in a hostile manner"). Similarly, the plain meaning of "oppose" connotes more than simple disapproval, but "to act against or provide resistance to; to stand in the way of; hinder; obstruct; to set as an opponent or adversary; to be hostile or adverse to, as in opinion." WEBSTER'S UNABRIDGED DICTIONARY at 1359; *see also* *McCormell*, 540 U.S. at 170 n.64.

In short, although the allegations present a close question,⁴ the language of this advertisement does not suffice to "attack" or "oppose" Mourdock under the PASO standard. Accordingly, we recommend that the Commission find no reason to believe that Gregg for Indiana and John Gregg violated 2 U.S.C. § 441i(f)(1).

III. RECOMMENDATIONS

1. Find no reason to believe that Gregg for Indiana violated 2 U.S.C. § 441i(f)(1);
2. Find no reason to believe that John Gregg violated 2 U.S.C. § 441i(f)(1);
3. Approve the attached Factual and Legal Analysis;
4. Approve the appropriate letters; and

⁴ Although we conclude that, on the whole, the advertisement does not attack or oppose Mourdock, some of its features could be read to imply an attack on, or opposition to Mourdock. The general tone of the advertisement is objectively negative. The advertisement aims to align state candidate Pence's views on the Tea Party and abortion with Mourdock's views, which had recently been made the subject of critical commentary in the national media. While the language of the advertisement does not directly identify Mourdock as a candidate for U.S. Senate, the news banner caption in one of the video clips reads "RICHARD MOURDOCK, Indiana, Candidate for U.S. Senate" and in another video clip, Pence states "I support his candidacy for the Senate." The advertisement expressly links Mourdock with the Tea Party, while the tagline exhorts hatemongers: "You can stop the Tea Party with Governor John Gregg." Finally, the inclusion of Mourdock's statement, "To me, the highlight of politics, frankly, is to inflict my opinion on someone else," as a reflection on "how [he would] govern," comes closest to "attacking" or "opposing" Mourdock, as it appears intended to reflect negatively on Mourdock's qualities and fitness for office.


5. Close the file.


Date

6/3/13

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